

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION II

CA06-242

December 6, 2006

COUNSELING SERVICES OF
EASTERN ARKANSAS & THE
ZENITH INSURANCE COMPANY
APPELLANTS

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION [F203812]

V.

JANETT HUGHES

APPELLEE

REVERSED

In this workers' compensation case, the administrative law judge determined that appellants, Counseling Services of Eastern Arkansas and its insurance carrier, Zenith Insurance Company, were responsible for all hospital, medical, and related expenses for treatment of appellee Janett Hughes's admitted, compensable injuries, including, but not limited to, reimbursement to appropriate health providers who paid for evaluation of appellee's headaches, blackouts, and vascular problems, and that appellants remained responsible for continued, reasonably necessary medical treatment for appellee's admitted, compensable injuries. The ALJ further found that appellee was entitled to additional temporary-total disability for the period beginning May 15, 2003, and

continuing through January 29, 2004, while being evaluated for a determination as to the cause of her continuing headaches, blackouts, and vascular problems. The Commission affirmed and adopted the ALJ's opinion, and appellants now appeal those determinations to this court.

On appeal, appellants argue that there is no substantial evidence to support the Commission's decision (1) that appellee is entitled to the payment of her medical expenses associated with the treatment of her alleged blackouts, headaches, and vascular problems, and (2) that appellee is entitled to temporary-total disability benefits from May 15, 2003, until January 29, 2004. We agree with appellants, and we reverse the Commission's award of benefits to appellee.

We note preliminarily that appellants have filed a motion to strike portions of appellee's brief, which this court passed to the panel for decision with the submission of the case. In this motion, appellants point out that in her argument, appellee included a statement that she had subsequently returned to Dr. Ricca and he had noted further deterioration in her spine and recommended surgical intervention. Appellee noted that this information was not a part of the record in this matter. Appellants have now requested that this statement be stricken from appellee's brief. Appellants are correct that this court should not consider that statement, as it is, even by appellee's own admission, not a part of the record before this court, and we grant appellants' motion to strike that portion of appellee's brief.

Standard of Review

In workers' compensation cases, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms the decision if it is supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Geo Specialty, supra*. It is the Commission's province to determine witness credibility and the weight to be given to each witness's testimony. *Johnson v. Riceland Foods*, 47 Ark. App. 71, 884 S.W.2d 626 (1994).

In a workers' compensation case, it is the claimant's burden to prove by a preponderance of the evidence both that her claim is compensable and that there is a causal connection between the work-related accident and the later disabling injury. *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 19 S.W.3d 36 (2000). The determination of whether the causal connection exists is a question of fact for the Commission to determine. *Id.*

Facts

Appellee, Janett Hughes, was employed by Counseling Services of Eastern Arkansas as an adult case manager. In this job, she was responsible for approximately forty clients, and one of her duties was transportation. On March 20, 2002, appellee was

involved in a motor vehicle accident after dropping one of her clients off for a doctor's appointment, and she suffered right knee, back, and neck injuries, which appellants accepted as compensable. Appellee ultimately underwent discectomies, as well as a cervical fusion in September 2002, and a lumbar fusion in November 2002. Appellants paid temporary-total disability from March 20, 2002, until December 17, 2002, and temporary-partial disability from December 22, 2002, through January 18, 2003. Appellee returned to work from December 16, 2002, to January 17, 2003, when she was again taken off work; appellants paid temporary-total disability from January 28, 2003, until March 10, 2003. Dr. Gregory Ricca, appellee's neurosurgeon for both her cervical and low back problems, stated that appellee reached maximum medical improvement on March 5, 2003, and released her to return to work on March 10, 2003. In his office notes, Dr. Ricca discussed appellee's functional-capacity exam of February 19, 2003, which indicated that she could perform at least light-duty work and that she had symptom magnification in testing consistencies, which suggested that she could exceed that amount of effort if needed. Dr. Ricca stated that appellee's job demands fell into the sedentary work range; however, he noted that appellee reported that driving was "quite difficult" and that she was unable to do that. Dr. Ricca noted that "after a long discussion," it was agreed that he would allow her to return to work on March 10, 2003, with light-duty restrictions, except no excessive driving.

Appellee testified at the hearing that she returned to work and was on light duty in the office until March 26, 2003; appellee stated that at that time, Scott Waddell, the

personnel director, told her that she should be able to go back to her case-management job on a full-time basis; that she should not have any trouble driving; and that if she did not start performing her case-management duties the following day, he would fire her.

Appellee said that she performed her case-management job from March 27 until April 1, 2003. On April 1, appellee testified that she was leaving her last client's house; that she was stopped at a stop light; that a car turned in front of her; that she had to stop quickly; that it hurt her neck; that the next day she started having blackout spells; and that Dr. James Meredith, her primary-care physician, took her off work until the following Monday. She said that when she returned to work the following Monday, she completed an accident report. Appellee said that Dr. Meredith restricted her from driving on May 15, 2003, because of her blackout spells; that she informed her employer of this; that their response was "if you can't do your job, don't bother coming in at all"; and that they told her light-duty work was no longer available.

On cross-examination, appellee stated that she believed that her injury caused her to develop headaches, blackouts, heart palpitations, "weird things" with her blood pressure, loss of feeling in her right leg, bilateral swelling in both feet, and loss of feeling in her right hand. Appellee explained that her first blackout spell was April 2, 2003, which was the day after her "near miss" quick stop on April 1. She said that after that blackout, she was sweating and her heart was palpitating, she could not catch her breath and that the whole back of her head felt like it was "going to explode out in the front."

Upon questioning from the ALJ, appellee stated that appellants quit paying for treatment after she was released by Dr. Ricca in March 2003. She said that on May 15, 2003, her employer told her that if she could not do her job to not bother coming in; appellee said that as a result of that conversation, she left her employment because she did not feel that she could do the work, and that she had not worked since that time.

After the April 1, 2003 incident, appellee saw Dr. Meredith on April 3, and he noted that appellee presented with a headache, neck pain, and what she thought was a syncopal episode. Dr. Meredith noted that they reviewed her functional-capacity exam, and that appellee disputed several things said by the evaluators. Dr. Meredith diagnosed cervical-disc disease and migraine headaches; advised appellee not to drive; and referred her to Dr. Glenn Dickson. Dr. Dickson first saw appellee on May 14, 2003, and he advised appellee that she was unable to work until she was evaluated by a neurologist or neurosurgeon.

Appellee was referred to Dr. Ron South, a neurologist, who in turn referred her to Cardiology Associates of Northeast Arkansas and to Dr. Victor Biton of the Arkansas Epilepsy Program. Dr. Fraser Richards with Cardiology Associates of Northeast Arkansas evaluated appellee in June and July 2003; however, the tests performed, including carotid artery, tilt-table, serial BP/heart rate, EKG, twenty-four hour Holter monitor, 2-D M-Mode Color Flow Mapping, and cardiac Doppler, all proved negative for arrhythmia related etiology. Dr. Biton conducted a twenty-four hour EEG, which determined that appellee did not suffer from epilepsy. Appellee was then examined and

evaluated by Dr. Robert Abraham, a neurosurgeon, and Dr. Brian Dickson. None of these examinations revealed a cause for appellee's symptoms.

Appellee was next sent to Dr. Reginald Rutherford by appellants, who concluded that appellee's predominant problem was a conversion reaction. Dr. Rutherford recommended that appellee be seen by Dr. Judy White Johnson for a detailed psychological evaluation. Dr. Johnson stated that appellee's overall pattern was consistent with a conversion disorder attributable to the March 20, 2002, motor-vehicle accident. However, in his opinion, the ALJ noted that appellee's entitlement to benefits related to any psychological injury was not joined by the parties at the hearing and therefore, by necessity, had to be specifically reserved.

ALJ's Opinion

In his opinion the ALJ found that it was "undisputed that after [appellee] returned to work, she sustained either a recurrence of her compensable injury or an aggravation thereof when she was required to stop abruptly while driving a vehicle, causing additional neck pain followed by headaches and syncopal episodes which required her to return to her primary care physician, Dr. James T. Meredith, who again took [appellee] off work and made several referrals to determine the cause of [appellee's] blackouts and headaches." The ALJ found that appellee was credible and that she was entitled to reimbursement for all hospital, medical, and related expenses for the evaluation of her headaches, blackouts, and vascular problems. The ALJ further found that appellee was also entitled to an additional period of temporary-total disability from May 15, 2003,

when she was first taken off work by Dr. Dickson, until January 29, 2004, when Dr. Abraham released appellee to return on an as-needed basis, even though he specifically found that appellee’s “additional problems with headaches and blackouts were unrelated to her physical injury.” The Commission affirmed and adopted this opinion.

Expenses for Evaluation of Headaches, Blackouts and Vascular Problems

In *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 250-51, ___ S.W.3d ___, ___ (2005) (citations omitted), this court held:

The employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine . . . as may be reasonably necessary in connection with the injury received by the employee. The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. What constitutes reasonably necessary treatment under the statute is a question of fact for the Commission.

We hold that reasonable persons could not reach the Commission’s conclusion that all of the medical testing performed to determine the cause of appellee’s headaches and blackouts was reasonable and necessary treatment of appellee’s compensable injury, especially in light of the ALJ’s finding that the source of appellee’s problems was *unrelated* to her physical injury.¹ While appellee should certainly investigate the reason for her headaches and blackouts, when these problems cannot be related to her work-related compensable injury, it is not reasonable and necessary treatment for her

¹We offer no opinion as to the viability of a claim for a psychological problem, as that issue was specifically reserved by the ALJ.

compensable injury, and appellants are not responsible for the cost of that medical testing. Therefore, we reverse the Commission's award of benefits for the additional medical testing.

Temporary-Total Disability

The ALJ also awarded appellee additional temporary-total disability benefits. To be eligible for temporary-total disability, a claimant must be within her healing period and have a total incapacity to earn wages. *Fred's, Inc. v. Jefferson*, 89 Ark. App. 95, 200 S.W.3d 477 (2004). In *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 135, 84 S.W.3d 878, 882 (2002) (citations omitted), this court held:

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages; the healing period is that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character of his injury will permit, and that ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. The determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. These are matters of weight and credibility, and thus lie within the exclusive province of the Commission.

In light of our determination that the extensive additional testing appellee underwent to determine the cause of her headaches and blackouts was not reasonable and necessary treatment for appellee's compensable injury, we also hold that appellee did not remain in her healing period; therefore, we also reverse the Commission's award of

additional temporary-total disability benefits. The healing period is that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character of his injury will permit, and that ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. *Poulan Weed Eater, supra*. Dr. Ricca found that appellee reached maximum medical improvement in relation to her compensable injury on March 5, 2003, and released appellee to return to work on March 10, 2003.

We also hold that the evidence does not indicate that appellee was totally incapacitated from earning wages. Appellee's functional-capacity exam, although admittedly given before the April 1 "near miss" accident, indicated that she could perform sedentary work, and stated that her job as a case manager was within her capabilities. Appellee voluntarily quit her job because she did not feel that she could perform her duties, and she has not worked since. It was appellee's burden of proof to show that she was totally incapable of earning wages, and she failed to meet this burden. Therefore, we reverse the Commission's award of additional temporary-total disability benefits.

We note that in his opinion under the heading of temporary-total disability benefits, the ALJ states that it is undisputed that appellee sustained either a recurrence or an aggravation of her compensable injury on April 1, 2003. We further hold that appellee did not prove either a recurrence or an aggravation. A recurrence is not a new injury; rather, it is "another period of incapacitation resulting from a previous injury," and it occurs "when the second complication is a natural and probable consequence of a prior

injury.” *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 809, 20 S.W.3d 900, 903 (2000). An aggravation is a new injury resulting from an independent incident; an aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Parker v. Atlantic Research Corp.*, 87 Ark. App. 145, 189 S.W.3d 449 (2004). It cannot be undisputed that appellee suffered either an aggravation or a recurrence. An aggravation requires meeting the definition of a compensable injury, and in this case, there are no objective findings of an injury. A recurrence requires proof of another period of incapacitation that is the natural and probable consequence of a prior injury. Here, the evidence in the record does not support the finding of a recurrence either, as the ALJ found that appellee’s headaches and blackouts were not related to her prior compensable injury.

Reversed.

PITTMAN, C.J., and GRIFFEN, J., agree.